MOTION FILED
APR 21 1989

No. 88-1546

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PACIFIC MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

HARRIETTE TURNBOW,
Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF CALIFORNIA LIFE INSURANCE COMPANIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRAD WENGER
Counsel and Secretary
THE ASSOCIATION OF
CALIFORNIA LIFE INSURANCE
COMPANIES
1400 K Street, Suite 212
Sacramento, California 95814
(916) 442-3648

BARGER & WOLEN
RICHARDS D. BARGER
(Counsel of Record)
ROYAL F. OAKES
J. RUSSELL STEDMAN
530 West Sixth Street
Ninth Floor
Los Angeles, California 90014
(213) 680-2800

Attorneys for Amicus Curiae
The Association of California Life Insurance Companies

April 19, 1989

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

No. 88-1546

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PACIFIC MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Petitioners

v.

Harriette Turnbow,
Respondent.

Brad Wenger
Counsel and Secretary
The Association of California
Life Insurance Companies
1400 K Street, Suite 212
Sacramento, California 95814
(916) 442-3648

BARGER & WOLEN
RICHARDS D. BARGER
(COUNSEL OF RECORD)
ROYAL F. OAKES
J. RUSSELL STEDMAN
530 West Sixth Street
Ninth Floor
Los Angeles, California 90014
(213) 680-2800

Attorneys for *Amicus Curiae*
The Association of California Life Insurance Companies

April 20, 1989

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF	1
AMICUS CURIAE BRIEF	4
STATEMENT	4
ARGUMENT	4
1. The Court Should Grant the Petition for a Writ of Certiorari to Protect Uniformity of ERISA Regulation	5
2. The Nevada Supreme Court Has Created an Illogical Requirement That an Employer Must Intend to Guarantee the Continued Furnishing of Benefits in Order for ERISA To Apply	8
3. The Petition for a Writ of Certiorari Should be Granted as There is a Significant Split in Authority and Those Cases Favoring Non-ERISA Coverage are Incorrect	9
4. Turnbow Should be Considered a Participant of an ERISA Plan	12
5. Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

	Page
Belasco v. W.K.P. Wilson & Sons, Inc., 833 F.2d 277 (11th Cir. 1987)	9
Brooks v. Burlington Industries, ____ U.S. ____; 106 S.Ct. 3267 (1986)	6
Credit Managers Ass'n v. Kennesaw Life and Acc. Ins. Co., 809 F.2d 617 (9th Cir. 1987)	9
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982)	5, 9
Eversole v. Metropolitan Life Ins. Co., Inc., 500 F.Supp. 1162 (C.D. Cal. 1980)	9
Fort Halifax Packing Co., Inc. v. Coyne, ____ U.S. ____; 107 S.Ct. 2211 (1987)	6, 10, 11
Holland v. Burlington Industries, Inc. 772 F.2d 1140 (4th Cir. 1985)	6
Kanne v. Connecticut General Life Ins, Co., 859 F.2d 96 (9th Cir. 1988)	9
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	4, 5, 6
Rizzi v. Blue Cross of Southern California, 206 Cal.App.3d 380 (1988)	2, 10
Sayble v. Blue Cross of Southern California, 207 Cal.App.3d 953 (1989)	2, 10, 11
Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983)	6
Taggart Corp. v. Life & Health Benefit Admin., 617 F.2d 1208 (5th Cir. 1980)	6

TABLE OF AUTHORITIES CITED

Page

Statutes

United States Code, Title 29, Section 1002 8

United States Code, Title 29, Section 1144(a) ... 6

Supreme Court Rules

Rule 17.1(c) 2

No. 88-1546

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PACIFIC MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

HARRIETTE TURNBOW,
Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Association of California Life Insurance Companies ("ACLIC") respectfully requests leave to file the accompanying *amicus curiae* brief in support of Petitioner Pacific Mutual Life Insurance Company's ("Pacific Mutual") Petition for a Writ of Certiorari to the Nevada Supreme Court. Counsel for Pacific Mutual has consented in writing to ACLIC filing an *amicus curiae* brief; counsel for Respondent Harriett Turnbow has refused consent. ACLIC is a California nonprofit trade association whose members are domestic California life insurance companies and foreign life insurance companies which do business in California. One of the primary purposes of ACLIC is to represent the interests of its members, for their benefit and that of their policyholders, in substantial public policy matters which affect them.

At stake in this case is the goal of uniform regulation and certainty of remedies at the heart of the Employee

Retirement Income Security Act of 1974 ("ERISA"). The Court should resolve the disputes now raging among various Circuits and state courts as to what employee benefit plans come within the purview of ERISA. The determination of the issues raised by Pacific Mutual in the instant case will be of great importance to the people of the many states, including California, and therefore by definition of concern to ACLIC. Moreover, the California Appellate Courts have joined the fray with conflicting decisions in *Sayble v. Blue Cross of Southern California*, 207 Cal.App.3d 953 (1989), and *Rizzi v. Blue Cross of Southern California*, 206 Cal.App.3d 380 (1988). Thus, the issues in this case are of particular interest to ACLIC.

ACLIC has reason to believe that the issues it addresses concerning the need for uniform regulation under ERISA and the corresponding certainty of remedies will not be fully addressed by the parties. Indeed, Pacific Mutual's Petition does not discuss these issues in great depth. Moreover, the brief discussions of *Sayble, Rizzi* and the decision at issue here in ACLIC's brief will provide this Court with detailed information concerning the actions of California State Courts of Appeal which have decided an important question of federal law which has not been, but should be settled by this Court. This will aid the Court in determining whether to grant the Writ of Certiorari under the considerations in Rule 17.1(c) of the Rules of this Court.

For the foregoing reasons, ACLIC respectfully requests leave to file the accompanying *amicus curiae* brief.

DATED: April 19, 1989

Respectfully Submitted,

BRAD WENGER
Counsel and Secretary
THE ASSOCIATION OF
CALIFORNIA LIFE INSURANCE
COMPANIES
1400 K Street, Suite 212
Sacramento, California 95814
(916) 442-3648

BARGER & WOLEN
RICHARDS D. BARGER
(Counsel of Record)
ROYAL F. OAKES
J. RUSSELL STEDMAN
530 West Sixth Street
Ninth Floor
Los Angeles, California 90014
(213) 680-2800

Attorneys for Amicus Curiae
The Association of California Life Insurance Companies

No. 88-1546

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

PACIFIC MUTUAL LIFE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

HARRIETTE TURNBOW,
Respondent.

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF CALIFORNIA LIFE INSURANCE COMPANIES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

STATEMENT

The statement of this case is set forth in Pacific Mutual's Petition, which statement is adopted here.

ARGUMENT

This Court, having shut the front door and locked it, now finds the Nevada Supreme Court swinging the back door wide open. In *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987), this Court determined that state law claims and remedies concerning benefits under ERISA plans were preempted by the exclusive remedies specified in ERISA because Congress intended that Act to preempt

state regulation of employee benefit plans. The Nevada Supreme Court has now determined that the majority of America's employee health benefit plans — those where the employer simply purchases insurance and/or delegates administration to some other entity — are *not* covered by ERISA.

Suddenly, the *Pilot Life* decision is threatened with evisceration. Smaller and medium-sized "garden variety" employee benefit plans *are* subject to state law claims and remedies. The Nevada Supreme Court's rationale in *Turnbow* creates a gaping hole in ERISA, threatening its purpose and intent by limiting its scope to those plans collectively bargained for or otherwise required by some employer/employee contract.

This Court should grant Pacific Mutual's Petition for Writ of Certiorari because the Nevada Supreme Court's decision, as well as those of other courts, creates troublesome and unwarranted distinctions between ERISA plans and plans now ruled to be "non-ERISA plans." In turn, this problem seriously threatens the uniform set of federal regulations which encourages and enables many employers to provide benefits to their employees.

1. The Court Should Grant the Petition for a Writ of Certiorari to Protect Uniformity of ERISA Regulation

The Writ of Certiorari should be granted as varying state regulations will impair the providing of health benefits to employees. As *Turnbow* recognizes, by subscribing to the multiple-employer trust ("MET") underwritten by Pacific Mutual, small and medium-sized employers are able to obtain lower insurance rates. This benefit of METs is an accepted fact. *See Donovan v. Dillingham,* 688 F.2d 1367, 1370 (11th Cir. 1982) (the purpose of MET is to

allow small employers to secure group health coverage at more favorable rates); *Taggart Corp. v. Life & Health Benefit Admin.*, 617 F.2d 1208, 1210 (5th Cir. 1980) (MET allowed group insurance for employers too small to qualify for group rates). Reduced rates for group insurance — whether through a MET or otherwise — permit greater numbers of employers to provide their employees with health care benefits. Encouraging employers to provide such benefits to their employees is an obvious and essential goal of ERISA.

To encourage the growth and development of employee benefit plans, Congress desired a unified system of regulations of those plans to replace a patchwork of state and local rules and remedies. *See Fort Halifax Packing Co., Inc. v. Coyne*, ____ U.S. ____; 107 S.Ct. 2211, 2217 (1987). As explained in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), at page 105 n. 25, and reiterated in *Fort Halifax* at 107 S. Ct. 2217, an important goal of ERISA is to encourage efficient administration of employee benefit plans because inefficiencies in those plans caused by conflicting state regulations might result in a lowering of benefit levels, elimination of benefits or benefits not being provided in the first instance. The preemption provision of ERISA, found in 29 U.S.C. § 1144(a), is intended to ensure uniform regulation. Section 1144(a) contains language of "unparalleled breadth,"[1] and has a preemptive scope "as broad as its language." *Shaw, supra* at 99.

The Nevada Supreme Court has let in through the back door that which *Pilot Life* refused entry. *Turnbow* contains two holdings: first, that in order for a benefit plan to

---

[1] *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1985), *aff'd mem. sub. nom., Brooks v. Burlington Industries*, ____ U.S. ____; 106 S.Ct. 3267 (1986).

qualify as an ERISA plan, the employer must intend to continue providing guaranteed benefits on an ongoing basis; and second, that the *owner* of a business which maintains an ERISA plan is not considered to be an ERISA "participant," even though the owner's employees, who enjoy the same insurance coverage as the owner, are considered ERISA "participants."

The health care program involved in the present case provided group health benefits to respondent Harriette Turnbow and many others across the nation through the purchase of insurance from Pacific Mutual. The effect of the *Turnbow* decision is to subject Pacific Mutual, and similar ERISA claims fiduciaries, to the varying laws of the fifty states with respect to claims processing for those plans not deemed by the state courts to come within ERISA *and* the provisions of ERISA for those that are. Pacific Mutual faces the unenviable task of determining on each claim whether a particular employee benefit plan is or is not a plan for purposes of ERISA in order to determine the claims processing laws with which it must comply. Further, even if a particular employer is deemed to have created an ERISA plan, Pacific Mutual must then determine whether or not the individual claimant is or is not an *ERISA* participant so as to be subject to ERISA's exclusive claims processing regulations, fiduciary standards and civil enforcement remedies.

It is difficult to imagine a more nightmarish scenario. The inefficiencies created by 51 potential different sets of regulations could cause increased premiums, reductions in benefits or inability of employers to obtain needed insurance. Such a result cannot serve the purposes of ERISA and threatens the benefits of ERISA to participating American workers. This Court should grant the Petition for Writ of Certiorari in order to determine with

finality what the guidelines will be for determining whether a plan is one subject to ERISA. The need for uniformity is great, and the conflicting decisions in the Circuits and various states damaging.

2. The Nevada Supreme Court Has Created an Illogical Requirement That an Employer Must Intend to Guarantee the Continued Furnishing of Benefits in Order for ERISA to Apply

The gravamen of the Nevada Supreme Court's decision is that no employee welfare benefit plan can be within ERISA unless the employer *intends to guarantee* continued furnishing of benefits. Nowhere in 29 U.S.C. § 1002, the statute defining an ERISA plan, or in the governing regulations by the Department of Labor, can the requirement of intention "to guarantee the continued furnishing of the benefits" by an employer be found.

Turnbow fails to explain exactly how such intent on the part of an employer could be proven. Despite the facts of the instant case, the Nevada court concluded intent cannot be proven by the maintaining of insurance for employees for *nine* years. This test creates an impossible hurdle for an employee benefit plan to come within ERISA unless those plans are required by collective bargaining agreements or some other employee/employer contract.

The statistics cited in Pacific Mutual's Petition for a Writ of Certiorari reveal that over 145 million working Americans and their dependents are covered by employer or union-sponsored health benefit programs. Ninety-nine percent of employer health care plans involving fewer than 100 employees are insured, and 92% of the plans

involving 100 or more employees are insured.[2] Obviously, a tremendous number of health plan participants are potentially affected by ERISA. The overwhelming majority of those participants employed by small and medium-sized employers ultimately receive their benefit through insurance. Under the "intentions" test created by the Nevada Supreme Court, most of these individuals will not enjoy the protections of ERISA, nor will the ERISA fiduciaries involved enjoy the certainty and uniformity of ERISA regulation and remedies.

3. The Petition for a Writ of Certiorari Should be Granted as There is a Significant Split in Authority and Those Cases Favoring Non-ERISA Coverage are Incorrect

Pacific Mutual's Petition for a Writ of Certiorari details the conflicts between various Circuit courts and among the state courts. What can be gleaned from Pacific Mutual's discussion is that many courts have considered the purchase of insurance by an employer as substantial evidence of an ERISA plan[3] and sometimes treated it as sufficient in and of itself.[4] Other courts, such as the Nevada Supreme Court, have created varying exceptions to these rules.

---

[2]Petition for a Writ of Certiorari to the Supreme Court of Nevada, page 27, n. 35.

[3]*Kanne v. Connecticut General Life Ins. Co.*, 859 F.2d 96, 99 (9th Cir. 1988); *Credit Managers Ass'n v. Kennesaw Life and Acc. Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987). *Donovan, supra* at 1373.

[4]*See Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280 (11th Cir. 1987); *Eversole v. Metropolitan Life Ins. Co., Inc.*, 500 F.Supp. 1162, 1165 (C.D. Cal. 1980).

Of particular importance to ACLIC are the California state court cases of *Sayble v. Blue Cross of Southern California*, 207 Cal.App.3d 953 (1989), and *Rizzi v. Blue Cross of Southern California*, 206 Cal.App.3d 380 (1988). The different results in these cases further demonstrate the need for this Court to grant Pacific Mutual's Petition.

Rizzi reviewed the various regulations promulgated by the Department of Labor as well as its opinion letters and concluded that when an employer purchased insurance and, by the terms of the insurance arrangement, was involved in certain initial administrative details,[5] ERISA preempted state common law and statutory remedies for alleged mishandling of claims. *Sayble*, on the other hand, in an aggressive and unwarranted attack upon ERISA, ruled that an employer must do much more than merely fund premiums payments for group insurance.

Without specifying what administrative activity the employer must engage in, the *Sayble* court concluded that because "there was no employer-operated plan, there was no potential for employer abuses such as self dealing, imprudent investing, and misappropriation of plan funds" the rationale of ERISA would not be served. *Sayble, supra* at 962. The *Sayble* decision, which effectively removes all non-employer administered benefit plans from ERISA, is supposedly predicated upon this Court's decision in *Fort Halifax*.

Fort Halifax involved the issue of whether a *one-time* severance pay mandated by state law was preempted by ERISA. The Court concluded that this single payment

---

[5]The only administrative activities other than paying premiums specified in *Rizzi* are advising which employees were to be enrolled in the plan and which should be terminated, and being deemed as the party to whom notice of changes was sufficient. *Rizzi, supra* at 390-91.

was not within ERISA because there was no ongoing plan:

> "The requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize." *Fort Halifax, supra,* 107 S.Ct. at 2218.

Fort Halifax raises an important concern for applying a "purposes of ERISA" test, but its facts do not support *Sayble's* conclusions. An employer paying insurance premiums for group coverage on behalf of its employees *does* face "periodic demands on its assets that create a need for financial coordination and control." Moreover, employers who purchase group insurance must select the participants, handle enrollment, pay the premiums and, therefore, maintain financial integrity.

Also overlooked by *Sayble* and *Turnbow*, the delegation of administrative activity to an insurer through the payment of premiums constitutes an ongoing plan which does involve tremendous administrative activity. By definition, the investigation, consideration and payment or denial of submitted claims is administrative in nature. The mere fact that, as in over 90% of *all* employee benefit plans,[6] the employer delegates these obligations to a third party as expressly permitted by ERISA rather than doing them

---

[6]Petition for a Writ of Certiorari to the Supreme Court of Nevada, page 27, n. 36.

itself should not determine whether an ERISA plan has been established.

4. Turnbow Should be Considered a Participant of an ERISA Plan

The Supreme Court of Nevada also concluded that even if an ERISA plan was created, Turnbow was not a participant thereunder. Turnbow was the owner of a business that employed three other people. In fact, it makes no sense to differentiate between the owner of an enterprise and her three employees, with respect to who qualifies as a "participant" under an ERISA plan.

Turnbow would have an enormously disruptive effect on the operations of employee benefit plans and their claims fiduciaries. If the Nevada Supreme Court is correct in this regard, then claims fiduciaries under ERISA will face 51 potential differing sets of regulations not merely for varying plans, but also for individual participants within those plans. The claims fiduciary will be required to attempt the difficult task of determining whether a participant has a substantial equity interest in the business in which he or she is engaged, so as to be considered an employer under the applicable state's laws. Under this ruling, the nightmare merely worsens.

The goal of uniformity of federal regulation cannot be served by the uncertainty created when a participant's employment status determines what law will govern a claim and the handling thereof. As argued above, varying regulations create inefficiencies which ERISA seeks to avoid. The Nevada Supreme Court should not be allowed to create a quagmire of regulations which could place health insurance beyond the reach of small or medium-sized employers or reduce or eliminate those benefits which are now provided.

5. Conclusion

For the foregoing reasons, *Amicus Curiae* The Association of California Life Insurance Companies urges this Court to issue a Writ of Certiorari to review the judgment and opinion of the Nevada Supreme Court.

Dated: April 19, 1989

Respectfully Submitted,

BRAD WENGER
Counsel and Secretary
THE ASSOCIATION OF
CALIFORNIA LIFE INSURANCE
COMPANIES
1400 K Street, Suite 212
Sacramento, California 95814
(916) 442-3648

BARGER & WOLEN
RICHARDS D. BARGER
(Counsel of Record)
ROYAL F. OAKES
J. RUSSELL STEDMAN
530 West Sixth Street
Ninth Floor
Los Angeles, California 90014
(213) 680-2800

Attorneys for Amicus Curiae
The Association of California Life Insurance Companies

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 21, 1989, I served three copies of the within Motion for Leave to File *Amicus Curiae* Brief and Brief of *Amicus Curiae* in re: "Pacific Mutual Life Insurance Company, et al., vs. Harriette Turnbow" in the Supreme Court of the United States, No. 88-1546, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Carl F. Martillaro, Esq.
412 N. Curry
Carson City, NV 89701

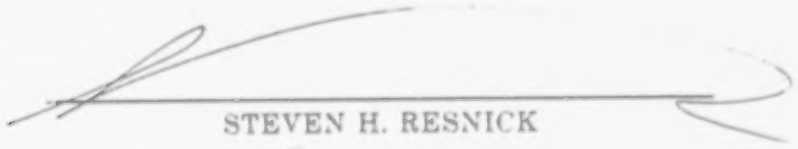
Riley M. Beckett, Esq.
223 S. Division St.
Carson City, NV 89701

David L. Bacon, Esq.
Adams, Duque, & Hazeltine
523 W. 6th St.
Los Angeles, CA 90014

All Parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 21, 1989, at Los Angeles, California.



STEVEN H. RESNICK